Office-Supreme Court, U.S.
FILED
MAR 26 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 1020

CHRYSSOULA GIANNAKOUROS, Widow and personal representative of DIMITRIOS GIANNAKOUROS, Deceased; ASPASSIA PISTOLAS, Widow and personal representative of JOHN PISTOLAS, Deceased; PARASKEVI DAOUTOS, Widow and personal representative of ANASTASSIOS DAOUTOS, Deceased; AMALIA IKONOMAKIS, Widow and personal representative of JOHN PANAGHIOTOU IKONOMAKIS, Deceased; and RALPH RABINOWITZ, Administrator of the Estates of DIMITRIOS GIANNAKOUROS, JOHN PISTOLAS, ANASTASSIOS DAOUTOS, and JOHN PANAGHIOTOU IKONOMAKIS, Deceased.

Petitioners,

—vs—

ORIENTAL TANKER CORPORATION, S.A., as owner, operators and agents of the SS WORLD SKY; and OVERSEAS TANKSHIP LIMITED, as owners, operators and agents of the SS CALTEX LONDON, in personam.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION AND APPENDIX

DONALD S. SHERWOOD
Counsel for Petitioners
225 Broadway
New York 7, New York

March 23, 1965

12 CASE PRESS INC., 401 HUDSON ST., N.Y.—CHELSEA 3-5840

TABLE OF CONTENTS

PAGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

Citations to Opinions Below 2

Jurisdiction 2

Statement 2

Questions Presented 4

Statutes and Rules Involved 4

Reasons for Granting the Writ 5

Reason 1 5

Reason 2 7

Reason 3 9

Conclusion 10

APPENDIX:

Opinion of the United States Court of Appeals for the Fourth Circuit A-1

Opinion of the United States District Court for the District of Virginia A-4

Opinion of the United States Court of Appeals for the Second Circuit A-10

CITATIONS

Cases

	PAGE
Kunglig Jarnvagsstyrelsen v. United States, 19 F. 2d 761 (1927)	5
Miner v. Atlass, 363 U.S. 641	8
The SS Nea Hellas, 116 F. 2d 803 (C.C.A. 2d Cir., 1941)	7
Phillips v. The Hellenic, 179 Fed. Supp. 5 (D.C.S.D. N.Y., 1959)	7
Tsangarakis v. Panama Steamship Company, 185 Fed. Supp. 502 (E.D. Pa. 1960)	6
The Ucayali, 47 Fed Supp. 203 (E.D. La. 1942)	6

Statutes

Judicial Code §2073	8
28 U.S.C. 1254(1)	2
46 U.S.C. §860	2

Federal Rules of Civil Procedure

Rule 12(b)	8
Rule 81(a)(1)	4, 8

Authorities and Texts Cited

American Jurisprudence p. 478 (Vol. V, 2 Ed.)	9
American Jurisprudence p. 479 (Vol. V, 2 Ed.)	10
American Jurisprudence p. 479-480 (Vol. V, 2 Ed.)	10

IN THE

Supreme Court of the United States

October Term, 1964

CHRYSSOULA GIANNAKOUROS, Widow and personal representative of DIMITRIOS GIANNAKOUROS, Deceased; ASPASSIA PISTOLAS, Widow and personal representative of JOHN PISTOLAS, Deceased; PARASKEVI DAOUTOS, Widow and personal representative of ANASTASSIOS DAOUTOS, Deceased; AMALIA IKONOMAKIS, Widow and personal representative of JOHN PANAGHIOTOU IKONOMAKIS, Deceased; and RALPH RABINOWITZ, Administrator of the Estates of DIMITRIOS GIANNAKOUROS, JOHN PISTOLAS, ANASTASSIOS DAOUTOS, and JOHN PANAGHIOTOU IKONOMAKIS, Deceased,

Petitioners,

—vs—

ORIENTAL TANKER CORPORATION, S.A., as owner, operators and agents of the SS WORLD SKY; and OVERSEAS TANKSHIP LIMITED, as owners, operators and agents of the SS CALTEX LONDON, in personam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment to the United States Court of Appeals for the Fourth Circuit dated November 16, 1964, entered upon a decision of that Court dated November 16, 1964.

Motion for rehearing was made on December 16, 1964 and denied by the Court of Appeals for the Fourth Circuit on December 28, 1964.

Citations to Opinion Below

The opinion of the United States District Court for the District of Virginia, Hoffman, U.S.D.J., is unreported and set forth in Appendix A4.

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and set forth in Appendix A1.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 16, 1964, rehearing was denied on December 28, 1964.

Jurisdiction of this Court is invoked pursuant to the authority of 28 U.S.C. 1254 (1).

Statement

This petition relates to a libel in admiralty against ORIENTAL TANKER CORPORATION, S.A., as owner and operator of the SS WORLD SKY and OVERSEAS TANKSHIP LIMITED, as owner and operator of the SS CALTEX LONDON seeking to recover damages for wrongful death due to the fault of the respondents arising as a result of a collision and other fault occurring on or about July 14, 1960. Decedents were crew members aboard the vessel WORLD SKY which flew the Liberian flag while the CALTEX LONDON flew the British flag. The libel sought relief under the General Admiralty Law of the United States, the statutes of the United States including the Death on the High Seas Act, 46 U.S.C. 860 et seq. and the laws of the Republic of Liberia, which laws incorporate the General Admiralty

Laws of the United States as part of the Liberian Maritime Code. Petitioners also invoked benefits of all treaties and conventions between the United States and the Republic of Liberia allowing reciprocal rights of access to the courts of each other. The libel was issued in the United States District Court for the District of Virginia and process was delivered and citation served upon the Clerk of the State Corporation Commission of Virginia as the statutory agent for the respondents and the same were forwarded by the Clerk of the Commission pursuant to law by registered mail upon the respondents.

Thereafter and on August 9, 1962 the respondents filed motions to quash and vacate service of process.

Subsequent to the filing of the motion to quash service of process, respondents, ORIENTAL TANKER CORPORATION, S.A., filed exceptions to the libel on the ground that it was not the owner of the SS WORLD SKY and consequently not a proper party respondent.

Proceedings were had on January 7, 1963 arguing the motions to quash and the exceptions and the hearings were continued.

District Judge Walter Hoffman directed the entry of an order sustaining the motions to quash and dismissing the libel.

Thereafter libelants appealed to the United States Court of Appeals for the Fourth Circuit and urged that Court to reverse the order quashing service and dismissal of the libel upon the ground that the shipowners had voluntarily entered a general appearance and waived all claim defects of service by:

> "(1) Oriental contesting merits of controversy as to its ownership of the vessel WORLD SKY in its pleadings and evidence submitted; contesting whether the libel states a cause of action against it; counterclaiming for a money judgment against appellants for its taxable costs incurred in this action.
>
> "(2) Overseas contesting merits of the controversy as to whether the libel states a cause of action against it in its pleadings and submitting evidence in support thereof."

The appeal was decided adversely to petitioners and a petition of rehearing was denied by the Court of Appeals on December 28, 1964.

Question Presented

The question presented is whether in a proceeding in admiralty a general appearance is made by respondents when it contests on the factual merits its status as a proper party respondent and files exceptive allegations to the libel on a matter separate and apart from that involving the validity of service of process. In a proceeding in admiralty may a libel be dismissed on the merits as to all moving parties on a motion to quash service of process?

Statutes and Rules Involved

The provisions of Rule 81 (a) (1) of the Federal Rules of Civil Procedure which provides in pertinent part:

> "These rules do not apply to proceedings in admiralty."

Reasons for Granting theWrit

1.

The decisions of the Courts below in this admiralty proceeding that the filing of an exceptive allegation and the seeking of relief upon the merits do not constitute a general appearance and waiver of a motion to quash the service is contrary to the long accepted practice of admiralty and unless this Court settles the question as to whether admiralty will continue to recognize the practice of distinguishing between special and general appearances, there will be no certainty as to the practice to be followed in the various District Courts of the United States and proceedings involving the filing of motions to quash service of process and exceptive allegations.

The decision of the United States Court of Appeals for the Fourth Circuit is not only contrary to the general admiralty practice but also conflicts directly with the decision of the United States Court of Appeals in *Kunglig Jarnvagsstyrelsen* v. *United States*, 19 F. 2d 761, 762 (1927) A10, which held that exceptive allegations alleging that a libel failed to assert a cause of action within the Court's admiralty jurisdiction constituted a plea to the merits of the controversy amounting to a general appearance rather than a special plea to the jurisdiction.

The Court of Appeals for the Second Circuit stated:

> "By the exceptions filed, not only is an attack made upon the venue of the suit, but the sufficiency of the libel. The tenth paragraph of the libel pleads that the District Court has jurisdiction in the premises. Article 3 of the exceptions filed pleads that 'the libel fails to allege that the claimed cause of action set

> forth is within the admiralty jurisdiction of this court,' and article 4 that it fails to allege 'when the claimed cause of action arose.' Article 5 is an exception to the eleventh interrogatory attached to the libel, because it calls for information which is 'immaterial, in that it is not germane to the alleged cause of action.' These exceptions do not raise merely the question of the jurisdiction of the court as such. *There is a plea to the merits of the controversy. We have in name a special appearance, but in fact a general appearance.* The jurisdiction of the District Court as such is accepted by the appellee to determine the sufficiency of the libel and, indeed, the controversy on the facts and law. Thames & Mersey, Ins. Co. v. United States, 237 U.S. 19, 35 S. Ct. 496, 59 L. ed. 821, Ann. Cas. 1915, D 1087; Jones v. Andrews, 77 U.S. (10 Wall), 327, 19 L. ed. 935, By this pleading a general appearance was made in the District Court, which, under article 10 of the libel, was claimed to have jurisdiction. And Congress by Suits in Admiralty Act, Sec. 2, granted jurisdiction to the court in personam of the United States. It likewise provided for correction of a defect of venue by transfer to the proper district." (Emphasis ours)

Similarly in *Tsangarakis* v. *Panama Steamship Company*, 185 F. Supp. 502, 504 (E.D. Pa. 1960), it was held that exceptive allegations going to the merits constituted a general appearance and cured all defects of service.

Whatever reservations respondent, ORIENTAL TANKER CORPORATION had when it filed its exceptive allegations may not be credited for as held in *The Ucayali*, 47 F. Supp. 203, 205 (E.D. La. 1942):

> "In determining whether there has been a general appearance submission to the jurisdiction, the intent of the pleader is to be determined not by what he says but by the nature of what he does. * * * It is the act which speaks and not the secret purpose."

It must be noted that exceptive allegation in the case at bar is analogous to that of a demurrer under the common law and former rules of pleading on the civil side. See *The SS Nea Hellas,* 116 F. 2d 803, 805 (C.C.A. 2d Cir., 1941).

2.

The question presented in the case *sub judice* is of considerable importance and of far reaching significance in the admiralty practice in that the decision below is a departure from the procedure heretofore existing in admiralty.

Parties to admiralty proceedings should be aware particularly where there is no specific rule as to what constitutes a general appearance and as to what may or may not be done by a respondent who is seeking to quash service of process but who may otherwise be subject to liability on the merits.

Until now, it has generally been believed, as stated in *Phillips* v. *The Hellenic,* 179 Fed. Supp. 5 (D.C.S.D. N.Y., 1959) a decision emanating from one of the busiest admiralty courts of the United States:

> "That the old principle still obtains in admiralty and that any motion or exception addressed to the merits of the libel must be considered in the nature of a demurrer and gives the Court jurisdiction of the person of the moving party. While there is a dearth of decisional law on the point, the few cases

> in admiralty would seem to be ample authority to support the proposition."

The decision below, despite the disclaimer of the Court of Appeals imports into the admiralty practice the provisions of the Federal Rules of Civil Procedure (F.R.C.P. 12(b)), despite the fact that Rule 81(a) (1) F.R.C.P. declare that the Civil Rules are not applicable to proceedings in admiralty.

The Courts below have usurped the powers of this Court to prescribe rules of practice, a procedure in admiralty and maritime cases granted by § 2073 of the Judicial Code.

As this Court has stated in *Miner* v. *Atlass*, 363 U.S. 641:

> "the . . . practice authorized by the Civil Rules does not of its own force provide the authority sought since those rules are expressly declared inapplicable to proceedings in admiralty."

Without a specific rule authorizing the joinder of substantive motions with a motion to quash service of process because of improper service the former rule obtaining which recognized the distinction between special and general appearance would still exist on the Civil side.

Certainly so important a subject as to the procedure relating to the distinction between general and special appearances should not be left to decisional law particularly where uniformity of practice should obtain in all the District Courts.

Indeed if it had been felt that the admiralty rules should comport with the Civil Rules in this regard at least then there should be a formal promulgation and it should not be left to the local courts as was done in the case at bar, to depart from accustomed admiralty practice.

3.

The decision below is clearly erroneous for respondent, ORIENTAL TANKER moved not merely to quash service but it sought also to obtain affirmative relief on the merits by the filing of an exceptive allegation that as a matter of substantive law it was not a proper party by contending that it was not the owner of the vessel despite record documentation to the contrary. By affidavit, it sought to persuade the District Court that the libellants had sued ORIENTAL TANKER for a tort for which it was not responsible in that the company had already parted with title to the vessel. In opposition to such application the libellants presented documents which required the District Court to hold that the respondents could not prevail on such appearance. In any event whether or not ORIENTAL was a proper party respondent goes to the merits of the controversy and not to the threshold question as to whether it was properly served.

It has been generally understood that:

> "A special appearance is merely for the purpose of objecting to the jurisdiction of the Court over the person of the defendant." 5 American Jurisprudence 2 Ed. 478.

Continuing, it has been stated in American Jurisprudence:

> "An appearance is special when the defendant appears for the purpose of objecting to the jurisdiction of the Court over him, and confines his appearance solely to that question of jurisdiction. Thus, a special appearance tests the jurisdiction of the Court over the defendant's person, or questions the sufficiency of the original notice either in its contents or

> manner of service. . . . It is assumed that the only purpose of a special appearance is to attack the jurisdiction of the court." 5 American Jurisprudence 2 Ed. 479.

The distinction between a general and special appearance has been stated to be as follows:

> "An appearance in the first instance for any other purpose is usually considered general and gives the same jurisdiction over the person of the defendant as though process had been regularly served in the manner and form and for the length of time prescribed by law. A party who wishes to insist on the objection that he is not in court must keep out for all purposes except to make that objection, and must ask nothing of the court inconsistent with the contention that the court lacks jurisdiction." 5 American Jurisprudence 2 Ed. 479-480.

CONCLUSION

Because of the need for a definitive declaration as to the admiralty practice pertaining to general and special appearances and because of conflict between the decisions of the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Second Circuit and the departure from accepted admiralty practice, petitioners respectfully pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

DONALD S. SHERWOOD
225 Broadway
New York 7, New York
Counsel for Petitioners.

March 23, 1965

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9591

Chryssoula Giannakouros, Widow and personal representative of Dimitrios Giannakouros, Deceased; Aspassia Pistolas, Widow and personal representative of John Pistolas, Deceased; Paraskevi Daoutos, Widow and personal representative of Anastassios Daoutos, Deceased; Amalia Ikonomakis, Widow and personal representative of John Panaghiotou Ikonomakis, Deceased; and Ralph Rabinowitz, Administrator of the Estates of Dimitrios Giannakouros, John Pistolas, Anastassios Daoutos and John Panaghiotou Ikonomakis, Deceased,

Appellants,

versus

Oriental Tanker Corporation, S.A., as owner, operators and agents of the SS WORLD SKY, and Overseas Tankship Limited, as owners, operators and agents of the SS CALTEX LONDON, in personam,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued November 10, 1964. Decided Nov. 16th, 1964)

Opinion of Court of Appeals

Before HAYNSWORTH and BRYAN, Circuit Judges, and THOMSEN, District Judge.

Sidney H. Kelsey for Appellants, and Walter B. Martin, Jr., (Vandeventer, Black, Meredith & Martin on brief) for Appellees.

PER CURIAM:

The SS World Sky and the SS Caltex London collided in the Persian Gulf. Four Greek seamen, members of the crew of the World Sky, lost their lives when the ship sank after it put to sea following temporary repairs effected in Sudan. Their widows filed these libels in Admiralty in the Eastern District of Virginia, undertaking to effect personal service upon the shipowners by service of process upon the Clerk of Virginia's State Corporation Commission.

The Caltex London was owned by Overseas Tankship Limited, an English corporation, while the World Sky was owned by Oriental Tanker Corporation, S.A., a Panamanian corporation. Each corporation moved to quash the service on the ground that it did no business in Virginia and was not present therefor the purpose of service of process. Additionally, Oriental filed an exceptive allegation, in which it claimed that it was not the owner of the World Sky at the time of the collision.

On appeal from an order quashing the service, it is contended that Oriental's exceptive allegation, expressly made subject to the previous motion to quash and purporting to reserve its rights under the motion, was a general ap-

pearance upon the basis of which the Court should exercise its jurisdiction.[1]

We agree with the District Court's conclusion[2] that the exceptive allegation was not a waiver of the motion to quash the service and the objections to the exercise of the Court's in personam jurisdiction. The power of an Admiralty court to withdraw from the extremes to which the general appearance rule had been pushed and to find no waiver when there was no intentional abandonment of the jurisdictional objection was upheld after careful consideration in Untersinger v. United States, 2 Cir., 172 F. 2d 298. For the reasons persuasively stated there, we agree.

This is not a general importation of Rule 12(b) of the Federal Rules of Civil Procedure into Admiralty. Our conclusion is not foreclosed by the Supreme Court's holding in Miner v. Atlass, 363 U.S. 641, or by anything said in the opinion of this Court in Nolan v. Jensen, 4 Cir., 272 F. 2d 630. We are not fashioning an Admiralty rule, but are applying judicially developed principles in an area where no Admiralty rule is applicable. If the Admiralty courts had the power to carry the principle to inordinate lengths, they have the power to confine it within reasonable bounds.

Affirmed.

---

[1] It is also contended that Overseas entered a plea to the merits when, in its motion to quash, it included a statement that the cause of action did not arise in Virginia. The allegation is appropriate to the motion to quash and is clearly not a plea to the merits.

[2] Giannakouros v. Oriental Tanker Corporation, D.C.E.D. Va., F. Supp.

District Court's Memorandum Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Chryssoula Giannakouros, widow and personal representative of Dimitrios Giannakouros, deceased, et al,

Libelants,

v.

Oriental Tanker Corporation, S.A., as owner, operators and agents of the SS WORLD SKY, and Overseas Tankship, Limited, as owners, operators and agents of the SS CALTEX LONDON, in personam,

Respondents.

The libel herein was filed on July 27, 1962. It alleges that the four deceased seamen were employed by Oriental Tanker Corporation, S.A., a Panamanian corporation, aboard the SS WORLD SKY, flying a Liberian flag, when, on or about July 14, 1960, this vessel was in collision with the SS CALTEX LONDON, alleged to be owned and operated by Overseas Tankship, Limited, in the Persian Gulf and, as a result of said collision, the four seamen were killed. It is further alleged that Overseas Tankship, Limited, is a corporation organized and existing under the laws of Great Britain. It is contended that the collision resulted from the mutual fault of both vessels.

In an apparent effort to include all possibilities of invoking jurisdiction, libelants claim the benefits of (1) applicable statutes of the United States, (2) Death on the High

Seas Act, (3) the laws of the Republic of Liberia, (4) the General Admiralty Law of the United States, (5) all treaties and conventions between the United States and the Republic of Liberia, and (6) if applicable, the Jones Act. In personam process was requested as to the corporate respondents and, as to any assets found within this district, a monition with clause of foreign attachment if and when said assets may be found. Proctors directed that the citation be served upon the Clerk of the State Corporation Commission of Virginia as the alleged statutory agent for the corporate respondents, under the theory that said respondents were doing business or transacting affairs in Virginia. The Clerk of the Commission received the citations on July 31, 1962, and forwarded same by registered mail to the respondent, Oriental Tanker Corporation, S.A., c/o Transoceanic Marine, Inc., 39 East 51st Street, New York 22, New York, and to the respondent, Overseas Tankship, Limited, Caltex House, Knightsbridge Green, London, S.W. 1, England; all as directed by proctors for libelants. The vessels have not been arrested and no assets of either respondent corporation have been found within Virginia.

On August 9, 1962, the two corporate respondents filed motions to quash the service of process. These motions, prepared and signed by proctors, specifically recite that the respondents "appearing specially by proctors, and for no other purpose" move the Court to quash the "purported service of process."

On September 7, 1962, prior to any hearing on the motions to quash, Oriental Tanker Corporation, S.A., filed exceptions to the libel, reading as follows:

> Now comes the respondent, Oriental Tanker Corporation, S.A., by its proctor, and without waiving its motion to quash and vacate service of process, excepts herewith to the libel filed herein on the ground that this respondent was not owner of the S/S WORLD SKY at the times alleged in the libel, said vessel having been sold by Oriental Tanker Corporation, S.A. on December 23, 1959.
>
> WHEREFORE, it is prayed that the exceptions of the respondent, Oriental Tanker Corporation, S.A., be sustained, that they be dismissed as a party respondent and awarded their taxable costs.

Further proceedings were had on January 7, 1963, at which time proctors argued the motions to quash and exceptions, pursuant to the Court's order of September 18, 1962. Additional evidence and affidavits were necessary to resolve the issues presented and the matter was continued generally for further hearing and submission of documentary evidence.

While we think that the evidence presented on the exceptions resolves itself into a factual issue as to the ownership of the WORLD SKY as of the date of the collision, we do not reach this point unless Oriental Tanker Corporation, S.A., is properly before the Court.

Each respondent has presented affidavits to the effect that it has no business contacts in Virginia, no office therein, no general agent, and no property within Virginia. As to Oriental Tanker Corporation, S.A., no vessel owned by said corporation called at a port in Virginia during the period from January 1, 1958, through January 1, 1962. While this affidavit was executed on January 28, 1963, there

is no contention that any vessel owned or operated by Oriental Tanker Corporation, S.A., visited any Virginia port between January 1, 1962, and the time of the execution of the affidavit. In any event, proctor for libelants has not suggested any contrary factual situation. As to Overseas Tankship, Limited—the correct corporate name being Overseas Tankship (U.K.) Limited—one vessel, the SS CALTEX KENYA, called at a port in Virginia during the period between August 1, 1958, and August 1, 1962. On that occasion the vessel arrived at Yorktown, Virginia, on August 14, 1960, and sailed the following day.

Despite the noticeable tendency in decisions to expand the scope of jurisdiction over non-resident persons and corporations, it cannot be seriously contended that either of the respondents has such a minimal contact with Virginia that would permit the maintenance of this action without seriously offending traditional notions of due process and fair play. *Moore-McCormack Lines, Inc.* v. *Bunge Corporation*, 4 Cir., 307 F. (2d) 910, 913. The deceased seamen were citizens of Greece; the collision took place in the Persian Gulf; assuming arguendo that Oriental Tanker Corporation, S.A., owns and operates vessels which may be commonly denominated as flying a "flag of convenience" this does not bring its operations into Virginia; the latter corporation was organized and is existing under the laws of the Republic of Panama; and as to Overseas Tankship (U.K.) Limited, it is a genuine corporation under the laws of Great Britain and the vessel involved in the collision apparently was flying the British flag. The one visit for one day of a vessel owned and operated by Overseas during

1960 is patently insufficient to find that Overseas was engaged in business or transacting affairs in Virginia at the time process was served and, of course, the cause of action did not arise in Virginia.

Libelants argue that by filing exceptions to the libel and requesting the allowance of costs, the respondent, Oriental Tanker Corporation, S.A., has waived its rights to contest any defect in the service. As early as August 15, 1962—several weeks prior to filing exceptions—proctor for respondents advised the Court that motions to vacate the purported services of process had been filed and requested a hearing. The Court acknowledged this letter on August 20, 1962, advising proctors that they should notify the Court whether evidence would be presented, as this would affect the time allocated for the hearing. Proctors replied that certain evidence would be required and libelants requested time to propound interrogatories and take depositions. The Court suggested a pre-trial conference and, in the interim, the exceptions were filed by Oriental. At the pre-trial conference the Court, desiring to dispose of all jurisdictional questions at one time, arranged a schedule for preliminary proceedings and entered an order on September 18, 1963. Included in this order was a provision for taking depositions if libelants saw fit to resort to same.

While not squarely in point, the case of *Nolan* v. *Jensen*, 4 Cir., 272 F. (2d) 630, deals generally with the same subject matter. The opinion of the district court in *Nolan* v. *Jensen*, 171 F. Supp. 351, 358-9, expresses the views of the trial court on the subject. In these days of crowded court dockets it is imperative that all matters touching upon

jurisdiction be disposed of at an early date. We hold that the respondent, Oriental, did not waive its motion to quash the purported service of process by filing exceptions to the libel raising the issue of ownership of the WORLD SKY. Indeed, such an issue could be interlocked with the motion to quash as, if the WORLD SKY had visited Virginia, it would be then pertinent to determine the name of the owner at that time.

An order will be entered sustaining the motions to quash and dismissing the action.

Present order after endorsement by proctors.

(Sgd) WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
February 27, 1964

Opinion of the Court of Appeals for the Second Circuit

(Kunglig Jarnvagsstyrelsen v. United States)

MANTON, Circuit Judge. The appellant, a Swiss corporation, with no office, place of business, or agent in the United States, sought to maintain this libel, filed under the Suits in Admiralty Act approved March 9, 1920, to recover for loss of cargo. On March 8, 1920, at the port of Philadelphia, Pa., a shipment of coal was made on the steamship Alderman, and bills of lading were issued. Later the coal was sold to the appellant and the bills of lading transferred. The ship sailed for Malmo, Sweden, and on the 9th of May was obliged to turn back to Philadelphia because of an accident. It remained in the port of Philadelphia until December, 1921. The libel alleged that, because of negligence of the master and agents of the ship in stowing and caring for the coal, it became overheated and caught fire on July 20, 1920, and again on August 1, 1920; that eventually the vessel was discharged and the coal sold in Philadelphia at $2 a ton; that the libelant has received no part of the proceeds of this sale, and that the coal has become a total loss to it.

Exceptions were filed to this libel by the appellee because (a) it failed to allege that the libelant was a resident or had a principal place of business within the district; (b) or that the steamship was found within the district at the time the libel was filed; (c) that it failed to allege that the claimed cause of action set forth is within the admiralty jurisdiction of the court, and (d) it failed to allege when the claimed cause of action arose.

The District Judge sustained the exceptions, because the suit was not brought within the Eastern district of Vir-

ginia, where the ship was located at the time the libel was filed. He said that it should be definitely pleaded that the cause of action arose within the statutory period of limitation, and pointed out that, if it be established that the vessel was within the Eastern district of Virginia, the court may have jurisdiction to transfer the case to the proper district for trial.

An application was made to transfer the suit and this was denied for want of power to grant such removal. The affidavit in support of the application for removal set forth that the libelant intended to move to amend the libel, showing that the steamship Alderman mentioned and described in the libel was at the time of the filing thereof in the state of Virginia.

Jurisdiction under sections of the Suits in Admiralty Act (Act March 9, 1920, c. 95, 41 Stat. 525 [Comp. St. §1251 1/4a] provides:

> "Such suits shall be brought in the district court of the United States for the district in which the party so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

This section was considered in Nahmeh v. United States, 267 U.S. 122, 45 S. Ct. 277, 69 L. Ed. 536, and the court held, in construing the section that Congress was evidently anxious to consult the convenience of intending libelants, and in taking away what was then protected by the law, namely, the rights of claimants to sue merchant vessels of the United States, as if they were private vessels, and as

the United States is present everywhere in the United States, libelants may name as the proper place for suit, either the place of residence of the parties suing, or of any one of them or their present place of business; or where the vessel or cargo charged with liability was found. In Eastern Transportation Co. v. United States (decided January 3, 1927) 47 S. Ct. 289, 71 L. Ed. ——, by the Supreme Court, a suit was brought by a Maryland corporation in the Eastern district of Virginia. The decision points out the great liberality of construction of the Suits in Admiralty Act (Comp. St. §§1251 1/4 to 1251 1/4L) in favor of libelants. It plainly exhibits an intent to subject merchant vessels of the United States to the responsibility of privately owned vessels. It points out that questions of venue may be waived.

The provisions of section 2, as to the district in which suits may be brought, refer to where the venue of the suits may be laid; also to which it may be removed under the following language: "Upon application of either party the cause may, in the discretion of the court, be transferred to any other District Court of the United States." It has been held that a libel in admiralty may be maintained against a corporation in any district by service there upon an attorney, appointed by the corporation, as required by the statutes of the state for service of legal process. In re Louisville Underwriters, 134 U.S. 488, 10 S. Ct. 587, 33 L. Ed. 991. The District Court has jurisdiction unless dismissed for defects in venue.

[1] This act was passed for the purpose of relieving the United States from obstruction of its commercial traffic by

the seizure of merchant vessels owned by it or under its control, and was intended to substitute an equivalent remedy against the United States in personam for the right in rem against the vessel which the Act of September 7, 1916, §9, c. 451, 39 Stat. 728 (Comp. St. §814e), had permitted. Blamber v. United States, 260 U.S. 452, 43 S. Ct. 179, 67 L. Ed. 346; Shewan & Sons v. United States, 266 U.S. 108, 45 S. Ct. 45, 69 L. Ed. 192.

[2] By the exceptions filed, not only is an attack made upon the venue of the suit, but the sufficiency of the libel. The tenth paragraph of the libel pleads that the District Court has jurisdiction in the premises.

Article 3 of the exceptions filed pleads that "the libel fails to allege that the claimed cause of action set forth is within the admiralty jurisdiction of this court," and article 4 that it fails to allege "when the claimed cause of action arose." Article 5 is an exception to the eleventh interrogatory attached to the libel, because it calls for information which is "immaterial, in that it is not germane to the alleged cause of action." These exceptions do not raise merely the question of the jurisdiction of the court as such. There is a plea to the merits of the controversy. We have in name a special appearance, but in fact a general appearance. The jurisdiction of the District Court as such is accepted by the appellee to determine the sufficiency of the libel and, indeed, the controversy on the facts and law. Thames & Mersey Ins. Co. v. United States, 237 U.S. 19, 35 S. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087; Jones v. Andrews, 77 U.S. (10 Wall.) 327, 19 L. Ed. 935. By this pleading, a general appearance was made in the District Court, which under article 10 of the libel, was claimed to

have jurisdiction. And Congress by Suits in Admiralty Act, §2, granted jurisdiction to the court in personam of the United States. It likewise provided for correction of a defect of venue by transfer to the proper district.

In United States v. N.Y. & O.S.S. Co. (C.C.A.), 216 F. 61, we pointed out the difference between jurisdiction of the subject-matter and of the venue of the suit, holding that the general intent of the act there under consideration—the Tucker Act (24 Stat. 505)—was to open the courts of the United States to suits against the government as respects the claims specified in that act, and that the intention was that they should be open to aliens as well as to citizens. We pointed out that the provision which requires the plaintiff to bring suit in the district in which he resides is applicable to a nonresident alien and to a citizen residing abroad, but that nevertheless the requirement is a personal privilege, which the law officers of the government may waive, and did waive by putting in a general appearance. See, also, St. Louis & San Francisco R. Co. v. McBride, 141 U.S. 127, 11 S. Ct. 928, 35 L. Ed. 659, and Panama v. Johnson (C.C.A.), 289 F. 964.

[3] In Barrow S.S. Co. v. Kane, 170 U.S. 100, 18 S. Ct. 526, 42 L. Ed. 964, the provisions of an act as to the districts in which suits must be brought were held to have no application to a suit against an alien or a foreign corporation, but such a person or corporation may be sued by a citizen of a state in any district in which valid service can be made upon the defendant. The provisions of section 2 relate, not to the jurisdiction of the subject-matter of the suit, but to the jurisdiction over the person, and the provi-

sions must be understood as establishing a privilege which the United States may insist on or may waive at its election, and it did waive it by its plea to the merits of the controversy.

[4] That part of section 2 which permits, in the discretion of the court and upon application of either party, a transfer from one district to any other district of the United States, depending upon the venue being laid pursuant to the foregoing provisions of section 2, was intended as a liberal provision granting power to the courts to make transfers. There is no limitation in the language as to the circumstances governing the transfer of the suit. The court for the Southern District of New York had jurisdiction by reason of the plea to the merits and therefore general appearance of the appellee. The case is in the wrong district, but the appellant timely moved for a change of venue to the Eastern District of Virginia. The court had the power under section 2 to grant the application. It was denied, not as a matter of discretion, but for want of power. The motion should have been granted.

[5, 6] But it is argued that, under the terms of the Suits in Admiralty Act, the libel must be filed within two years after the right to recover accrued. Any limitation as to the right to institute the suit was a matter of defense, and was not an affirmative part of the cause of action. Burnet v. Desmornes, 226 U.S. 145, 33 S. Ct. 63, 57 L. Ed. 159; Green Star S.S. Co. v. Nan[illegible]ng (C.C.A.), 3 F. (2d) 369. The libel was filed on November 16, 1922. While the fire and damage to the coal occurred in July and August, 1920, two years had not expired after the sale of the balance of the coal before the libel was filed. The limitation period did

not commence until the sale of the balance of the coal. The measure of damages was unknown until that time.

The decree is reversed, with directions to the District Court to overrule the exceptions.

L. HAND, Circuit Judge (dissenting). The libel did not allege that the ship was within the United States, a jurisdictional averment under Blamberg v. U.S., 260 U.S. 452, 43 S. Ct. 179, 67 L. Ed. 346, of which there could be no waiver by appearance or otherwise, since it went to the power of the court. The interlocutory decree of dismissal was therefore right. The libelant did not amend, but, following in intimation of the judge, moved to transfer the cause to the district where, as it then for the first time appeared, the ship lay, and where it should originally have brought suit. This raised the question whether a libel filed in the wrong district can be removed to the right one in the court's discretion under the last sentence of section 2.

The second sentence prescribing the places where the suit must be brought is in terms absolute; I do not believe that the last sentence conditions it. That was inserted for quite another purpose, that is for convenience in the trial of the cause, or perhaps only to reach other parties, as suggested in Nahmeh v. U.S., 267 U.S. 122, 126, 45 S. Ct. 277, 69 L. Ed. 536. In any case it presupposes that the suit has been brought in the right court, or that the respondent consents to it where it is. If it also includes the correction of the libelant's mistake in choosing his forum, Nahmeh v. U.S., 267 U.S. 122, 45 S. Ct. 277, 69 L. Ed. 536, would scarcely have been put on the ground it was, since the libelant had there asked to transfer and been denied.

If I am wrong, this curious possibility exists: A mistaken libelant may remove to the right court to escape dismissal, and then move back for the convenience of trial or to reach other parties. I do not believe that such a seesaw was ever contemplated. Ordinarily there is no hardship in suffering dismissal and beginning again, and while unhappily there is in this case, it is entirely due to the libelant's delays. At any rate we may not twist the intent to escape a hard case.

I vote to affirm.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 6 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 1020

CHRYSSOULA GIANNAKOUROS, Widow and personal representative of DIMITRIOS GIANNAKOUROS, Deceased; ASPASSIA PISTOLAS, Widow and personal representative of JOHN PISTOLAS, Deceased; PARASKEVI DAOUTOS, Widow and personal representative of ANASTASSIOS DAOUTOS, Deceased; AMALIA IKONOMAKIS, Widow and personal representative of JOHN PANAGHIOTOU IKONOMAKIS, Deceased; and RALPH RABINOWITZ, Administrator of the Estates of DIMITRIOS GIANNAKOUROS, JOHN PISTOLAS, ANASTASSIOS DAOUTOS, and JOHN PANAGHIOTOU IKONOMAKIS, Deceased,

Petitioners,

—vs—

ORIENTAL TANKER CORPORATION, S.A., as owner, operators and agents of the SS WORLD SKY; and OVERSEAS TANKSHIP LIMITED, as owners, operators and agents of the SS CALTEX LONDON, in personam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS, ORIENTAL TANKER CORPORATION, S.A. AND OVERSEAS TANKSHIP, LIMITED

WALTER B. MARTIN, JR.
819 Citizens Bank Building
Norfolk, Virginia
Proctor for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Citations to Opinions Below	1
Jurisdiction	2
Statement	4
Questions Presented	4
Reasons Why Writ Should Be Denied	4
Conclusion	6

APPENDIX:

Order of the United States Court of Appeals for the Fourth Circuit dated December 28, 1964	A-1
Opinion of the United States Court of Appeals for the Second Circuit	A-1

CITATIONS

CASES:

Department of Banking, State of Nebraska v. Pink, 63 S.Ct. 233, 317 U.S. 264, 87 L.Ed. 254	3
Kungling Jarnvagsstyrelsen v. United States, 19 F.2d 761, 762 (1927)	5
Podgorski v. U.S.A., 1950 A.M.C. 151	5
United States v. Markowitz, 34 F.Supp. 827	3
Untersinger v. United States	5, 6

STATUTES:

28 U.S.C. 1254(1)	2
28 U.S.C. 2101(c)	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1020

CHRYSSOULA GIANNAKOUROS, ET. AL., *Petitioners,*

v.

ORIENTAL TANKER CORPORATION, S.A., ETC., ET AL., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS, ORIENTAL TANKER CORPORATION, S.A. AND OVERSEAS TANKSHIP, LIMITED

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is reported at 235 F. Supp. 258.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 338 F. 2d 649.

JURISDICTION

The petitioner alleges that jurisdiction of this Court is pursuant to the authority of 28 U.S.C. 1254 (1). Jursidiction under the aforementioned statute is subject to the proviso of Title 28, U.S.C. 2101(c) that the petition for writ of certiorari be filed within ninety (90) days after the entry of the judgment or decree sought to be reviewed. It is the contention of the respondents that the petition for writ of certiorari in the case at bar was not filed within the time prescribed and consequently this Court is without jurisdiction to consider the same.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 16, 1964. On December 16, 1964, the petitioners filed a motion for rehearing, which motion was duly denied by the Court of Appeals for the Fourth Circuit on December 28, 1964, a copy of which order is set forth in Appendix A1. The petitioner for writ of certiorari in this matter was filed on March 26, 1965.

It is the position of the respondents herein that the filing of the motion for rehearing on December 16, 1964 merely "tolled" the running of the 90 day period until December 28, 1964, the date said motion was denied by the Court below. Consequently, to the 89 days which elapsed between December 28, 1964 (the date petitioner's motion for rehearing was denied by the Court below) and the date that the petition for writ of certiorari was filed in this Court must be added the period of 30 days elapsing between the judgment order of the Court below on November 16, 1964 and the filing of the motion for rehearing in the Court below on December 16, 1964.

In *Department of Banking, State of Nebraska* v. *Pink*, 63 S. Ct. 233, 317 U.S. 264, 87 L. Ed. 254, this Court stated:

> "A timely petition for rehearing tolls the running of the three-month period because it operates to suspend the finality of the State Court's judgment, pending the Court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties."

The 90-day period granted by 28 U.S.C. 2101(c) is analogous to a statute of limitations. In *United States* v. *Markowitz*, 34 F. Supp. 827, it was held:

> "When the running of the statutory period of limitations is suspended, the limitation period is arrested; it is prevented from running any further during the time of its suspension, and when the time of suspension is over, the statutory period of limitations commences to run again."

Bouvier's Law Dictionary defines suspension as "a temporary stop of a right, of a law, and the like." Bouvier then goes on to say that "the suspension of the statute for a limited time operates so as to prevent its operation for the time."

The position of the respondents as aforestated is that the running of the 90-day period in which a petition for a writ of certiorari may be filed was merely suspended from December 16, 1964 to December 28, 1964, and that the statute did not commence to run *de novo* on December 28, 1964, but rather it merely picked up where it had left off when it was "suspended" or "tolled" by the filing of the motion for a rehearing on December 16, 1964.

STATEMENT

The statement contained in petitioners' petition for a writ of certiorari is correct. However, as to the exceptions filed by Oriental Tanker Corporation, S.A., subsequent to the filing of its motion to quash and vacate service of process, it should be noted that these exceptions were prefaced with the express proviso that the exceptions were filed "without waiving its motion to quash and vacate service of process."

QUESTIONS PRESENTED

I. Where a petitioner files a motion for rehearing 30 days after the final order of the Court of Appeals is entered, and which motion is denied 12 days after the filing of the same, does the 90-day period in which a petition of writ of certiorari may be filed commence to run anew upon the denial of petitioner's motion for rehearing in the Appellate Court, or is the running of the 90-day period merely suspended and tolled during the period of time said motion is pending before the Appellate Court?

II. Does an Admiralty Court have the power to hold that the filing of exceptions subsequent to the filing of a motion to quash and vacate service of process does not constitute a general appearance where the Court has found that there was no intentional abandonment of the jurisdictional objection on the part of the party filing the exceptions?

ARGUMENT AND REASONS WHY THE PETITION FOR THE WRIT SHOULD BE DENIED

The main thrust of petitioners' reasoning why a petition for writ of certiorari should be granted in this matter is that the decision of the United States Court of Appeals for the Fourth Circuit in the case at bar

conflicts directly with the decision in the United States Court of Appeals for the Second Circuit in *Kungling Jarnvagsstyrelsen* v. *United States,* 19 F. 2d 761, 762 (1927). However, what petitioners have failed to do is to recognize and acknowledge that the aforementioned decision has been overruled by the same Appellate Court in the matter of *Untersinger* v. *United States,* 127 F. 2d 298 (1949), Appendix A-1.

Under the Federal Rules of Civil Procedure, it is clear that by filing exceptions the defendant would not have waived any right it might have insofar as a prior motion to quash and vacate service of process is concerned. See Rule 12(b) F.R.C.P. This doctrine has now been extended by many courts to the admiralty practice. *Podgorski* v. *U.S.A.,* 1950 A.M.C. 151; *Walsh* v. *U. S.,* 81 F. Supp. 667; *Untersinger* v. *U. S., supra.*

The reasoning of these courts which have adopted in admiralty the liberal civil rule is summed up thusly by Circuit Judge Swan, speaking for the United States Court of Appeals for the Second Circuit in the *Untersinger* case, *supra:*

> "Now that the highly technical and somewhat metaphysical rule of waiver has been done away with in civil actions in the Federal courts, we think that a similar liberalization should by analogy be recognized in Admiralty procedure. We find nothing in the general admiralty rules promulgated by the Supreme Court, 28 U.S.C.A., to stand in the way."

The Appellate Court below, in reaching its decision that the filing of exceptions subsequent to the filing of a motion to quash when the exceptions specifically reserve the objections raised in the motion to quash did

not constitute a general appearance, cited as authority the *Untersinger* case, *supra,* stating:

> "The power of an admiralty court to withdraw from the extremes to which the general appearance rule had been pushed and to find no waiver when there was no intentional abandonment of the jurisdiction objection, was upheld after careful consideration in *Untersinger* v. *United States,* 2 Cir., 172 F. 2d 298. For the reasons persuasively stated there, we agree."

CONCLUSION

This Court is without jurisdiction to entertain the petitioners' petition for writ of certiorari as the same was filed beyond the period permitted by statute. However, assuming arguendo that this Court does have jurisdiction to entertain petitioners' petition for writ of certiorari, it is respectfully submitted that there is no special and important reason for a review in this case, the decision of the Circuit Court of Appeals for the Fourth Circuit in this matter being in complete conformity with the ruling of the Circuit Court of Appeals for the Second Circuit in the matter of *Untersinger* v. *U. S., supra.*

Respectfully submitted,

WALTER B. MARTIN, JR.
819 Citizens Bank Building
Norfolk, Virginia
Proctor for Respondents

APPENDIX

Order of the Court of Appeal for the Fourth Circuit

Dated December 28, 1964

A petition for rehearing en banc having been filed and considered and found to be without merit, and in the absence of any supporting suggestion from any other member of this Court,

IT IS NOW ORDERED: That the petition for rehearing en banc be, and it hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

ALBERT V. BRYAN
United States Circuit Judge

ROSZEL C. THOMSEN
United States District Judge

Opinion of the Court of Appeals for the Second Circuit

(*Untersinger* v. *United States*)

SWAN, Circuit Judge.

This is a libel in personam to recover damages, as well as maintenance and cure, resulting from injuries alleged to have been sustained by the libellant while employed as a messman on the S. S. BULL RUN, a merchant vessel owned by the United States and operated for its account. At a pre-trial hearing the respondent moved for dismissal of the libel on the ground that the court lacked jurisdiction because the suit was not brought in the proper district. The motion was granted pursuant to an opinion. From the resulting decree of dismissal the libellant has appealed. The correctness of the decision depends upon whether or not the United States waived the defect in venue by answering to the merits, when its answer also set up defenses

alleging lack of jurisdiction because the vessel was not within the United States when the libel was filed, and improper venue.

(1) The Suits in Admiralty Act, §§ 1-12, 46 U.S.C.A. §§ 741-752, provides the exclusive remedy in admiralty against the United States for a maritime tort. *Brady* v. *Roosevelt S. S. Co.*, 317 U.S. 575, 577, 63 S. Ct. 425, 87 L. Ed. 471. Section 742 directs that a libel in personam shall be brought either in the district in which the libellant resides or has his place of business, or in the district in which the vessel charged with liability is found. The libel contained no allegation as to the residence of the libellant or the whereabouts of the vessel. At the pre-trial hearing it appeared that the libellant was not a resident of the southern district of New York when the libel was filed, January 29, 1946, nor at any time during the pendency of the suit; and that the steamer BULL RUN was not within the United States at the time the libel was filed.

(2) When the district court rendered its decision, it had not been authoritatively determined whether the statutory provisions as to the place of bringing suit pertained to jurisdiction or to venue. But on November 8, 1948, in *Hoiness* v. *United States*, 335 U.S. 297, 69 S. Ct. 70, 73, the Supreme Court held that such provisions are not jurisdictional but relate merely to venue; and the opinion concluded: "But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it." In the *Hoiness* case the United States had demonstrated such willingness; no exceptions to the libel and no motion to dismiss were filed, the case was heard on the merits, and after submission the trial judge *sua sponte* dismissed it for lack of jurisdiction. *Hoiness* v. *United States*, D.C.N.D.Cal., 74 F. Supp. 289. Plainly any defect in venue was waived by going to trial.

The appellant insists that the defect in venue, which the pre-trial hearing developed, was waived by the answer

previously filed by the respondent. If the test of waiver is, as suggested by the Supreme Court in the *Hoiness* opinion, the willingness of the United States to defend in a district other than those specified in the statute, it is clear that the answer negatived any such willingness, for it expressly alleged lack of jurisdiction and improper venue, notwithstanding that it also answered the merits. Hence waiver, if it exists, must be found in the technical rule that a general appearance or answer to the merits precludes a special appearance for the purpose of objecting to venue. *Texas & Pacific Railway Co.* v. *Cox*, 145 U.S. 593, 603, 12 S. Ct. 905, 36 L. Ed. 829. This was, indeed, the old common law rule and was apparently based on the motion that by pleading to the merits a defendant came before the court and could not thereafter say that he was not in court. Chitty on Pleadings, 16th Am. Ed., Vol. 1, pp. 443-4. This highly technical rule of the common law was applied by this court in a libel brought under the Suits in Admiralty Act in *Kunglig Jarnvasgsstyrelsen* v. *United States*, 2 Cir., 19 F. 2d 761, 763 where we held that exceptions which were a plea to the merits, although coupled with objections to venue, constituted a waiver of the defect in venue. There may be some doubt whether this decision accorded with the general practice in admiralty. But however that may be, the appellee contends that the *Kunglig* case should no longer be followed, since the common law rule, on which the decision rested, no longer obtains in civil actions in the federal courts because of the adoption of the Federal Rules of Civil Procedure, 28 U.S.C.A. Under Rule 12(b) the joining of objections to venue with a plea to the merits does not constitute a waiver of improper venue. *Orange Theatre Corporation* v. *Rayherstz Amusement Corporation*, 3 Cir., 139 F. 2d 871, 874; *Blank* v. *Bitker*, 7 Cir., 135 F. 2d 962, 966. We think the appellee's position is well taken.

(3-5) It has long been recognized that "the rules of pleading in the admiralty are exceedingly simple and free

from technical requirements." *Dupont de Nemours & Co.* v. *Vance*, 19 How. 162, 171, 15 L. Ed. 584; see also 2 Benedict on Admiralty, 6th ed., § 223. In *Boston Ins. Co.* v. *City of New York*, 2 Cir., 130 F. 2d 156, this court stated that although the Federal Rules of Federal Procedure have not yet been extended to admiralty, the "practice in admiralty is concededly extremely plastic and always has been so," citing the *Dupont* case, *supra*, "and it is legitimate to treat it as not immune to some of the changes in procedure elsewhere." Now that the highly technical and somewhat metaphysical rule of waiver has been done away with in civil actions in the federal courts, we think that a similar liberalization should by analogy be recognized in admiralty procedure. We find nothing in the General Admiralty Rules promulgated by the Supreme Court, 28 U.S.C.A., to stand in the way. In 2 Benedict on Admiralty, 6th ed., § 233, the author, after referring to general and special appearances and stating that a general appearance will, if practicable, be regarded as a waiver of any personal exemption or privilege, continues: "There is no rule on the point; it has been sufficiently settled by the cases and the customary practice. The Civil Rules are to the same effect: lack of jurisdiction of the person must be raised by objection, and is waived if not raised by motion, answer or reply: Rule 12(b) and (h)." As previously stated, the *Hoiness* opinion suggests that the inquiry as to waiver should be whether the United States has done anything in the suit to indicate its willingness to defend, despite the bringing of the suit in the wrong district. Certainly the answer did not show such willingness; it showed the opposite. The libel did not disclose whether the venue was proper or improper. Waiver presupposes knowledge of the defect which is waived. *Abbott* v. *United States*, D.C.-S.D.N.Y., 61 F. Supp. 989, 991. The facts which disclosed the defect were brought out at the pre-trial hearing and a motion to dismiss was then made. Very recently Judge Follmer held in *Walsh* v. *United States*, D.C.E.D.Pa., 81

F. Supp. 667, that there was no waiver where an objection to venue had been made in the answer which also pleaded to the merits. We agree with this decision.

Accordingly the decree is affirmed, but with leave granted to the libellant, if he so desires, to apply within 30 days to the district court, under § 1404 of Title 28 U.S.C., 1948 revision, to transfer the action to any other district where it might have been brought. Whether that section is applicable to the present cause and whether the action should be transferred are questions for the district court upon which we intimate no opinion.